

February 1968

Torts–Licensed Driver's Assumption of Risk While Instructing an Unlicensed Driver

John Reed Homburg
West Virginia University College of Law

Follow this and additional works at: <https://researchrepository.wvu.edu/wvlr>



Part of the [Torts Commons](#)

Recommended Citation

John R. Homburg, *Torts–Licensed Driver's Assumption of Risk While Instructing an Unlicensed Driver*, 70 W. Va. L. Rev. (1968).

Available at: <https://researchrepository.wvu.edu/wvlr/vol70/iss2/19>

This Case Comment is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact ian.harmon@mail.wvu.edu.

a view of the common law would be void as repugnant to the constitution.⁴⁸ The West Virginia court has also stated that they are "unmistakably enjoined to leave drastic changes in the common law to the legislative branch of the State government."⁴⁹ The questions of whether the adoption of comparative negligence by the court would be a drastic change, or whether such action violates the principle of separation of powers, would themselves be questions for the West Virginia court to resolve.

Martin Joseph Glasser

**Torts—Licensed Driver's Assumption of Risk While Instructing
an Unlicensed Operator**

P was giving *D*, a novice driver, driving instructions when the car ran off the road and *P* was injured. *P* sued *D* for her injuries and the trial court entered a judgment *non obstante verdicto* in favor of *D*, and *P* appealed. *Held*, reversed. One who accompanies a driver who possesses only a learner's permit for the purpose of giving driving instructions does not assume the risk of injury as a *matter of law*. *Chalmers v. Willis*, 231 A.2d 70 (Md. 1967).

The dissenting judge felt that there was no valid factual question as to the cause of the accident and that the accident was the result of the defendant's inexperience which was the very factor of which the plaintiff, as a matter of law, had assumed the risk.¹ The majority conceded that when the undisputed facts allow it, a plaintiff may be said to have assumed the risk as a matter of law. The court felt, however, that in this case and the great majority of cases there are several factual determinations which must be made by the jury before the law can be applied to the particular case.² The jury might have to determine any one or more of these factual questions: whether the plaintiff was accompanying the defendant to satisfy a statutory provision or to give active instructions; whether the driver, based on his experience doing the act that caused the accident, could still properly be held negligent in spite of his inexperience; whether the plaintiff, based on the facts, could have reasonably

⁴⁸ W. VA. CONST. art. VIII, § 21.

⁴⁹ *Cunningham v. County Court of Wood County*, 148 W. Va. 303, 308, 134 S. E.2d 725, 728 (1964).

¹ *Chalmers v. Willis*, 231 A.2d 70, 76 (Md. 1967) (dissenting opinion).

² *Chalmers v. Willis*, 231 A.2d 70, 73 (Md. 1967).

anticipated the degree of inexperience of the defendant; and whether the plaintiff may be said to have assumed the particular risk involved.³

The term assumption of risk is said to be based upon the doctrine of *volenti non fit injuria*—he who consents cannot be harmed.⁴ The courts, although they explain and define assumption of risk in differing manners, generally accept certain basic elements as necessary for the application of the doctrine. These necessary elements include knowledge and appreciation of the risk involved accompanied by a voluntary consent to encounter this known risk. The plaintiff must fully realize, appreciate and have full knowledge of the risk he is incurring.⁵ If the risk involved is one that is obvious, knowledge of the risk by the plaintiff is presumed.⁶ An objective standard is used to determine if the plaintiff has knowledge and appreciation of the risk.⁷ The plaintiff must encounter the known risk or obvious danger voluntarily by expressed or implied consent⁸ and this consent may be implied by the conduct of the parties.⁹ The plaintiff must, however, always have a reasonable election to expose himself to the risk or not.¹⁰ With regard to an occupant in a motor vehicle there are said to be three elements to the doctrine: "(1) a hazard or danger inconsistent with the safety of the occupant; (2) knowledge or appreciation of the hazard by the occupant; (3) acquiescence or a willingness to proceed in the face of the danger."¹¹ The assumption of risk by the plaintiff results in the plaintiff relieving the defendant of an obligation of conduct related to the risk, or plaintiff's advance abandonment of any right to complain of any harm that resulted from incurring the risk.¹²

The feeling that assumption of risk is a jury question is widespread. It has been held in fact situations analogous to *Chalmers*

³ *Id.* at 74.

⁴ *Richards v. Richards*, 324 S.W.2d 400, 401 (Ky. 1959).

⁵ *Id.* at 401; *Chalmers v. Willis*, 231 A.2d 70, 73 (Md. 1967).

⁶ *Chalmers v. Willis*, 231 A.2d 70, 75 (Md. 1967) (dissenting opinion).

⁷ *Chalmers v. Willis*, 231 A.2d 70, 73 (Md. 1967).

⁸ *Id.*

⁹ *Id.*

¹⁰ *Richards v. Richards*, 324 S.W.2d 400, 401 (Ky. 1959).

¹¹ 61 C.J.S. *Motor Vehicles* § 486(g) (1949). For additional discussion and definition of assumption of risk see the following: W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 67 (3d ed. 1964); 5A AM. JUR. *Assumption of Risk* § 787 (1936); 38 AM. JUR. *Negligences* § 171-173 (1941); *Annot.*, 43 A.L.R.2d 1155 (1955); 65A C.J.S. *Negligence* § 174 (1966).

¹² *Chalmers v. Willis*, 231 A.2d 70, 75 (Md. 1967) (dissenting opinion).

that assumption of risk is a jury question because of the possibility that lack of experience was not the sole cause of the accident,¹³ or because there was conflicting evidence on whether the licensed driver really assisted the permittee in learning to drive, or because the instructor had no knowledge of the permittee's inexperience.¹⁴ When the inexperienced driver has had some driving experience, it has been held that the instructor may rely on the driver to make intelligent use of that experience. Whether a resulting accident is caused by negligent use of this experience or is caused totally by inexperience is a jury question.¹⁵ The operator's possession of only a learner's permit has been held to be evidence of his incompetency as should be realized by the licensed driver but not such conclusive evidence as to decide the question as a matter of law.¹⁶ A unique case holds that while the licensed instructor as a matter of law assumes the risk of an accident which is solely the result of the driver's lack of skill and experience, it cannot be so held as a matter of law where there is no evidence which positively proves this was the *cause* of the accident. In this instance the doctrine of *res ipsa loquitor* can be invoked by the instructor which makes it a jury question whether the accident was caused by a risk the instructor assumed or by an unknown element which is considered to be the driver's negligence not related to his inexperience.¹⁷ Assumption of risk does not, as a matter of law, bar recovery for damages suffered as a result of meeting *both* a known risk and an unknown risk.¹⁸ Whether the licensed driver assumed the risk of the novice driver's *negligence* is a fact question and *cannot* be decided as a matter of law.¹⁹ The instructor does not, as a matter of law, assume the risk of the permittee's negligence because if that were so, no one would ride with or attempt to teach such permittee to drive.²⁰ These cases suggest that there are several issues which must be decided before the court can rule as a matter of law that

¹³ *Burns v. Wheeler*, 233 N.Y.S.2d 404, 406 (1962).

¹⁴ *Turner v. Johnson*, 333 S.W.2d 749, 750 (Ky. 1960).

¹⁵ *Constantin v. Bankers Fire and Marine Ins. Co.*, 129 So. 2d 269, 272 (La. Ct. App. 1961); *Holland v. Pitocchelli*, 299 Mass. 554, 558, 13 N.E.2d 390, 392 (1938).

¹⁶ *Joyce v. Quinn*, 204 Pa. Super. 580, 588, 205 A.2d 611, 615 (1964).

¹⁷ *Corbett v. Curtis*, 225 A.2d 402, 408-409 (Me. 1967).

¹⁸ *Vidal v. Town of Errol*, 86 N.H. 1, 7, 162 A. 232, 236 (1932).

¹⁹ *Sand v. Mahnan*, 56 Cal. Rptr. 691, 698 (1967); *Roberts v. Craig*, 124 Cal. App. 2d 202, 212, 268 P.2d 500, 507 (1954).

²⁰ *Jennings v. Hodges*, 80 S.D. 582, 591, 129 N.W.2d 59, 64 (1964).

the instructor has assumed the risk of the hazards of instructing an inexperienced driver.²¹

Not all courts adhere to this view, however. Again in cases analogous to *Chalmers*, it has been held that the licensed, experienced driver assumes, as a matter of law, the risk of an accident caused by the novice driver's inexperience when the licensed driver knows of that inexperience.²² The accident is said to be caused not by the novice driver's negligence but by his inexperience which is exactly the risk that should have been anticipated by the instructor or licensed driver.²³ The licensed driver will not be excused from the assumption of the risk merely because the inexperienced driver has taken a course in driver's training and is about to take the state driver's test. Until he has passed the test, the inexperienced driver is presumed under law to be incompetent.²⁴ One common element in all the cases holding that the licensed, experienced driver assumed the risk as a matter of law is that the court concludes the accident was caused by the novice driver's inexperience. Thus the main contrast between the *matter of law* holdings and the *jury question* holdings is that the *matter of law* decisions do not think it necessary to consider factors other than inexperience in determining the legal relationship between the parties.

West Virginia cases which discuss the assumption of risk doctrine do so primarily in comparing it with contributory negligence. The discussions show, however, that the West Virginia court defines assumption of risk to include the same elements that other courts find necessary for the application of the doctrine.²⁵ The West Virginia court in *Spurlin v. Nardo*²⁶ held that knowledge is a neces-

²¹ In an analogous situation it has been held that, like the issue of assumption of risk, the issue of contributory negligence cannot be decided as a matter of law but is a jury question. *Van Sciver v. Abbott's Alderney Dairies*, 950 N.J. Misc. 949, 951, 143 A. 153 (1928).

²² *St. Denis v. Skidmore*, 221 N.Y.2d 613, 614 (App. Div. 1961), *aff'd* 237 N.Y.S.2d 1004, 188 N.E.2d 268 (1963); *Spellman v. Spellman*, 309 N.Y. 663, 664, 128 N.E.2d 317, 318 (1955); *Le Fleur v. Vergilia*, 117 N.Y.S.2d 244, 245 (App. Div. 1952); *Thomas v. Steppert*, 200 Wis. 388, 393, 228 N.W. 513, 515 (1930).

²³ *Richards v. Richards*, 324 S.W.2d 400, 402 (Ky. 1959).

²⁴ *Aloisio v. Nelson*, 209 N.Y.S.2d 674, 675 (Misc. 1961).

²⁵ *Spurlin v. Nardo*, 145 W. Va. 408, 417-418, 114 S.E.2d 913, 919-920 (1960); *Mathews v. Cumberland and Allegheny Gas Co.*, 138 W. Va. 639, 656-657, 77 S.E.2d 180, 190-191 (1953); *Wright v. Valan*, 130 W. Va. 466, 477-478, 43 S.E.2d 364, 371 (1947); *Hunn v. Windsor Hotel Co.*, 119 W. Va. 215, 217, 193 S.E. 57, 58 (1937).

²⁶ 145 W. Va. 408, 418, 114 S.E.2d 913, 920 (1960).

sary element of assumption of risk doctrine. The court in that same case indicated also that it is a question for jury determination whether the plaintiff had sufficient knowledge of facts on which to base his choice of action.²⁷ Thus it is reasonable to forecast that the court will not permit the issue of assumption of risk to be decided as a question of law if there is any conflict in the evidence as to knowledge on the part of the injured instructor.

The West Virginia Code provides that one who holds an instruction permit must be accompanied by a licensed driver when he, the permittee, is driving.²⁸ Even the dissenting opinion in *Chalmers* agrees that when there is evidence that the plaintiff accompanied the driver only to satisfy a statutory requirement and not to give instructions, assumption of risk will be a jury question. The reason for this approach is that giving instructions clearly shows a realization of defendant's inexperience while, when no instructions are given the existence of such realization can be honestly disputed.²⁹ Under these particular circumstances the West Virginia court would probably hold that assumption of risk is a jury question.

The courts are in general agreement that knowledge and appreciation of the risk and voluntary consent to encounter the risk are the basic elements necessary to establish the defense of assumption of risk. Some courts feel that in factual situations similar to *Chalmers* several factors could have caused the accident and that these factors must be weighed by the jury in determining whether the plaintiff assumed the risk of the harm he incurred as a result of the accident. Other courts feel that the only possible cause of the accident was the defendant's inexperience and that the plaintiff assumed the risk, as a matter of law, of the harm that resulted from this inexperience. While the West Virginia court has spoken only generally on the issue of assumption of risk, it would appear that the language in *Spurlin v. Nardo* offers itself as a proper basis to forecast that the West Virginia court will treat assumption of risk as a jury question in a case in which a licensed driver who was injured while instructing an unlicensed driver sues that unlicensed driver.

John Reed Homburg

²⁷ *Id.* at 417, 114 S.E.2d at 919.

²⁸ W. VA. CODE ch. 17B, art. 2, § 5 (Michie 1966).

²⁹ *Chalmers v. Willis*, 231 A.2d 70, 77 (Md. 1967) (dissenting opinion).